In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 820

THE FAIRPORT, PAINESVILLE & EASTERN RAILROAD COMPANY,
Petitioner,

vs.

MAYME F. MEREDITH,
Respondent.

BRIEF OF RESPONDENT.

DAVID F. ANDERSON,
1226 Standard Bank Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

ANDERSON & LAMB,
Of Counsel.

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Section 11364 of the General Code of Ohio, among other things, provides:

> "* * * reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree under review shall be affirmed, * * *"

This Ohio law applied in full force and effect to the instant case. In addition, the Statutes of Ohio further provide:

> "Sec. 8949. No common carrier, engaged in moving traffic on a railroad, between points within this state, shall use on its line a locomotive therefor not

equipped with power driving wheel brakes and appliances for operating the train-brake system, or, in such business, run a train unless at least eighty-five per centum of the cars therein shall have air brakes thereon so arranged that they can be operated and used from the engine by the engineer of the locomotive drawing such train, and unless all of such cars so equipped shall be associated together."

If the Federal Safety Appliance law, as opposing counsel claim, does not apply in the instant case, then the State statute did. There was no conflict. The disobedience of either the Federal or State statute as a proximate cause was negligence *per se*.

The petition set out a case of ordinary negligence *and* of that which is known in Ohio as "Known Danger," which is ordinarily designated as "Last Clear Chance." Ohio law differs on this subject from the true doctrine of "Last Clear Chance" as laid down in the case of *Davis v. Mann*, 10 Messon & Welsby, 546, and in *Coasting Co. v. Tolson*, 139 U. S. 551; *R. R. Co. v. Ives*, 144 U. S. 408; *Chunn v. City R. R. Co.*, 207 U. S. 302.

> "1. Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the 'last clear chance,' notwithstanding his negligence, if the defendant did not, after becoming aware of plaintiff's perilous situation, exercise ordinary care to avoid injuring him."
>
> *Cleveland Ry. Co. v. Masterson*, 126 O. S. 42.

We had, under the laws of Ohio, the right to pursue our remedy under the "Known Danger" doctrine, which is *entirely separate and apart* from an ordinary negligence case.

> "4. A plaintiff may, in his petition, plead a case of ordinary negligence and may also plead a state of facts invoking the last chance rule; and he may re-

cover under whichever aspect the proof in the case assumes."

Cleveland Ry. Co. v. Masterson, 126 O. S. 42.

The petition contained, as a substantive ground of negligence, among other things, the following:

> "Third. In causing plaintiff said injuries when the defendant, through its employees, actually knew of the great danger in which plaintiff was placed so that said defendant had ample time in the exercise of ordinary care to have prevented said injuries after they had such actual knowledge." (R. p. 8.)

It will be necessary to some extent to understand the facts of the case, which were as follows. The accident happened at a grade crossing on an eighteen foot wide macadam road. To go upon the railroad company's tracks it was necessary for some little distance to go upon an upgrade. This highway in the summer time was very greatly used (the accident happened July 19, 1929), as it was the highway to be used by the traveling public from Painesville and other places in going to a recreation park. Where the railroad crossed the highway it was a very slight down grade in the direction the train was going. Mrs. Meredith, the plaintiff, was driving a Packard car and sitting on the lefthand side. Her daughter sat on the right side. The accident happened in daytime. As they approached the railroad there was an orchard on the left side of Mrs. Meredith, which completely obscured the approaching train and extended for eight hundred to one thousand feet and also obscured any view from anybody on a freight or other train for a like distance, and the limbs of the apple trees encroached upon the railroad's right of way quite a number of feet for the whole distance of eight hundred or one thousand feet. In other words, the people in an automobile could not see up the track until they were seventeen feet from the actual zone of danger and those on a train going

the same direction as in the instant case could not see an automobile until they were beyond the apple trees which extended along the railroad tracks for eight hundred or one thousand feet, practically the same distance as they extended along the highway. Three people testified that no signal of any kind was given. It is admitted that there was no whistling post or any other designation where a whistle should be given as the train approached this highway. The evidence also showed that there was no whistling posts at a large majority of the grade crossings, although the railroad was pretty nearly twenty miles long and crossed *streets and highways* and also the much used Federal highway known as No. 20, between Cleveland and Buffalo.

It was agreed that just immediately before the collision with the Packard car the train was moving in a backward motion at ten miles an hour. The locomotive engine was pulling thirty-two cars, all of which were loaded but nine. That a large majority of the thirty-two cars had been brought by the New York Central Railroad to the yards just before this train had been moved. The train was clearly engaged in interstate commerce, for a majority of the loaded cars had been brought on a continuous passage from places outside of the State of Ohio and was to be delivered to their destination by the train in question. As a matter of fact, the railroad had three places at which it received interstate commerce. Two were connected by yards with two trunk roads and also by a dock on the shores of Lake Erie.

It was the undisputed evidence that the railroad employes were furnished no rules of any kind, nor never had been, and that on the day of the accident none of the brakes at all upon the thirty-two cars could be operated by air. The air on the locomotive engine and the tender could be used but no air coupling was made between the locomotive

engine and the box car next to it. It was testified and not denied, that for a long time before this accident the train was hauled without the use of air brakes on the cars.

The Packard car was struck practically in the middle and then *carried on the locomotive engine six hundred and fifty-seven feet* and then the train stopped because the Packard car had been pulled, by a projecting tie, under the tender itself (R. pp. 60, 301), and there is no dispute that no injury had been received by either of the ladies in the automobile until after it was pulled under the tender and until the train had moved six hundred and fifty-seven feet beyond where the collision took place.

A large majority of the employees of the railroad company lived in Painesville, where the case was tried, and although the testimony showed that the train under the circumstances, in the exercise of ordinary care, could have been stopped in less than three hundred feet.

C. L. Fisher, Expert—

> "Q. Now, assuming a locomotive engine to be a little over 150,000 pounds, and the tender being 100,000 pounds, and standardized brakes, such as you have suggested, within what distance on a 1½ per cent grade could, in great emergency, a train be stopped, when it was pulling 32 cars, all of which were loaded except 9, using all of the things that you do use in an emergency?
>
> * * * * *
>
> Q. At ten miles an hour, on that grade at ten miles an hour, within what distance?
>
> A. Less than three hundred feet." (R. p. 81.)

No attempt was made to contradict the testimony of this expert witness Fisher and other railroad men who testified as to the distance within which the train could be stopped. Mrs. Meredith and her daughter were carried the six hundred and fifty-seven feet in the Packard car, which

was balanced on the end of the tender, part of the Packard car extending over each side of the train. When the carried automobile struck the projecting ties it was *then* pulled under the train, resulting in great and permanent injuries to the occupants of the automobile, Mrs. Meredith receiving such injuries that her leg had to be amputated between the knee and the hip.

Immediately before the collision the evidence shows without any dispute that the front brakeman, who was on the front of the tender, the fireman, and the engineer knew of the great danger of the Meredith ladies because they knew that the collision couldn't be avoided, and that after the collision the automobile was being carried on the front of the tender. The locomotive engine they were using was standardized and air was being used in the manipulation of the brakes of the tender and on the locomotive itself. The locomotive engine was provided with a filled sand box that would convey sand to either or both rails of the track. The sand was *white* and could be easily seen. Yet a number of witnesses testified that no sand was used in the six hundred and fifty-seven feet that the locomotive engine went from the crossing to the place that it afterwards stopped on top of the Packard car. See testimony of:

William Conlin, Record, page 217;
John Fitzgerald, Record, page 231;
James Doubledee, Record, page 280;
L. L. Dixon, Record, page 301;
Albert Isabel, Record, page 305;
Isabelle Isabel, Record, page 308;
Ralph Andrus, Record, page 312.

We had the legal right, beyond question, to have the Court direct a verdict on the doctrine of "Known Peril" in favor of the plaintiff, for practically all of the evidence affecting the case of "Last Clear Chance" or "Known Peril" was not disputed. The fact of actual knowledge of the

great danger of the plaintiff and her daughter; and the fact that the train was only moving ten miles an hour at the time of the collision; the fact that no air could be used in the thirty-two cars because of failure to couple the air; the fact that the train could have been stopped in less than half the distance it moved; the fact that no injury occurred to either of the occupants of the Packard car until after they had gone twice as far as the train could have been stopped in the exercise of ordinary care, were not disputed or no attempt was made to dispute these facts.

It made no difference in law on the issue of "Last Clear Chance" whether the Federal Safety Appliance Statute applied or not. Therefore, clearly "substantial justice" was done as the reviewing court in Ohio held in affirming the judgment.

DID THE PLAINTIFF RECEIVE ANY PROTECTION AT ALL FROM THE SAFETY APPLIANCE LAW IN REFERENCE TO AIR BRAKES?

Opposing counsel cite as the only alleged authority that the plaintiff received no protection at all by reason of the Federal Safety Appliance law, the preamble, which among other things provides:

> "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive-wheel brakes, *and for other purposes.*" (The italics are ours.)

If the Federal law was passed solely and wholly for the protection of those on the train and the employes of railroad companies then the State of Ohio statute applied in full, for then the Congress of the United States had not invaded that field, and a charge of the Court that a viola-

tion of the brake statute acting as a proximate cause was negligence *per se* is not error.

"4. The preamble is no part of an Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous."

Railway Co. vs. Thomas, 132 U. S. 174.

Chief Justice Fuller:

"But as the preamble is no part of the Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the Legislature is in itself fatal to the claims set up."

Railway Co. vs. Thomas, 132 U. S. 174, at page 188.

McCabe, J.:

"It is not infrequent for the legislature, in the preamble to a statute, to recite a particular mischief, while the legislative provisions extend far beyond the mischief recited. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil; * * *."

State of Indiana vs. Oil Company, 47 L. R. A. 632, 633.

"Both in England and this country, it was at one time a common practice to prefix to each law a preface, prologue or preamble, stating the motives and inducements to the making of it; but it is not an essential part of the statute, and is now frequently, if not generally, omitted."

Sedgwick on Statutory and Constitutional Law, at p. 42.

"But where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolved upon the court

of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law."

36 *Cyclopedia of Law and Procedure,* 1107.

Exactly the question raised by the railroad company in the instant case has been passed on and determined by a Court in Ohio, in the case of *Pennsylvania R. R. Co. vs. George R. Moses, Admr.,* decided October 28, 1931, by the Court of Appeals, and found in Ohio Law Bulletin and Reporter of July 4, 1932, page 491. In this *Moses* case the facts show that the accident happened at a grade crossing in Ohio and that there was a violation of the Federal Safety Appliance laws in reference to equipment of the locomotive engine. The Court of Appeals held, in reference to the violation of the Federal Safety Appliance Act, that there was no error in charging that such violation was negligence *per se.*

Yet it is the claim of opposing counsel that the many thousands of Ohio citizens and others who are constantly using the many grade crossings in the night season are not protected by the Federal Safety Appliance laws in reference to the headlight on the locomotive and that only the men employed by the railroad companies or passengers are in any way or to any degree protected.

Take for instance the Federal "hours of service" law and assume that the engineer in operating a train across a grade crossing in Ohio had been employed much in excess of the hours therein mentioned and by reason of such overwork his ability to exercise his faculties had been very greatly diminished or destroyed and as a proximate cause thereof people attempting to cross the railroad tracks in an automobile had been severely injured or killed. Can it be claimed, within the exercise of common sense or justice, that the violation of the Federal "hours of service"

law should not be taken into consideration in a suit against the railroad company?

Respectfully submitted,

DAVID F. ANDERSON,
Attorney for Respondent.

ANDERSON & LAMB,
Of Counsel.